United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

ORIGINAL WITH PROOF OF SERVICE

76-1426

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MICHAEL MEDICO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION OF DEFENDANT-APPELLANT MICHAEL MEDICO FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

Defendant-Appellant Michael Medico ("Defendant") respectfully petitions for a rehearing, and suggests rehearing en banc, of the appeal decided by a panel of this Court (Van Graafeiland, C.J., Carter, D.J.) (Mansfield, C.J., dissenting), in an opinion filed May 25, 1977, affirming a judgment of conviction entered in the United States District Court for the Eastern District of New York of two counts of bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and of conspiracy to rob a bank in violation of 18 U.S.C. §371. United States of

America v. Michael Medico, No. 76-1426, Slip Op. 3795 (2d Cir., May 25, 1977).

This application is controlled by F.R.A.P. 35(a) which provides with respect to hearings en banc:

> "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

As will be developed in this petition, not only is reconsideration by the full Court necessary to secure uniformity of decisions within this Circuit, but in addition the proceeding involves questions of exceptional importance.

STATEMENT OF THE CASE

Defendant appealed to this Court from a judgment of conviction of bank robbery and conspiracy following a jury trial before the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York. Defendant had been sentenced on September 17, 1976, by Judge Weinstein to eight years imprisonment, and has been in custody in respect of this matter since his arrest on June 2, 1976. On February 22, 1977, a panel of this Court consisting of Circuit Judges Mansfield and Van Graafeiland, and District Judge Carter of the United States District Court for the Southern District of New York, sitting by designation, heard oral argument. Decision was reserved, and, on May 25, 1977, the panel, in a split decision, affirmed the judgment of conviction.

There are two holdings of the majority (Van Graafeiland,

C.J., Carter, D.J.) which should be reviewed by all the judges of this Circuit. The first concerns the admission into evidence of certain testimony and actual exhibits not connected with the crimes charged which are of similar nature to but far more inflammatory and prejudicial than the testimony involved in United States v. Robinson, 544 F.2d 611 (2d Cir. 1976), presently under reconsideration by this Court en banc.

The second holding involves the admission of double hearsay evidence in what we submit to be an incorrect application of Rule 804(b)(5) of the Federal Rules of Evidence. The decision is in variance with the decision of another Court of Appeals, as expressed in United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975), respecting the impact of the Sixth Amendment of the United States Constitution on the hearsay evidence rule; and, as the majority concedes, it is an interpretation of first impression in this Circuit on the application of 804(b)(5) to criminal cases. In addition there is the cogent dissent of Judge Mansfield on the grounds that the application of Rule 804(b)(5) in this situation did not, as a matter of fact, even meet the inherent credibility standards asserted in that Rule and the admission of this evidence constituted an abuse of discretion and the error was not "harmless." (Slip op. at 3813)

POINT I

EVIDENCE INCLUDING EXHIBITS THAT A SHOTGUN AND A .22 CALIBER PISTOL HAD BEEN FIRED IN THE APARTMENT WERE OF NO PROBATIVE VALUE AS REGARDS THE CHARGES IN THE INDICTMENT AND WERE HIGHLY PREJUDICIAL TO DEFENDANT. ADMISSION OF THAT EVIDENCE AND SENSATIONALIZED USE BY PROSECUTION ON SUMMATION CONSTITUTED PLAIN ERROR.

It was plain error for the trial court to admit into evidence the following items having no probative value in linking Defendant to the bank robbery for which he had been indicted, which were removed from an apartment, stipulated by defense counsel as being Defendant's, by F.B.I. agents: a pair of ladies red pants, riddled by what one F.B I. witness said were "pellet holes possibly from a shotgun;" a shotgun shell; a .32 caliber revolver shell; a .22 caliber shell; a Smith .22 caliber cartridge; and three lead fragments which had been removed from a wall in the apartment and which a second F.B.I. agent identified as either .22 or .25 caliber slugs fired from a .22 caliber pistol. No weapon was found on Defendant at the time of his arrest, nor was any weapon discovered during the search of the apartment.

The affirming opinion is predicated upon the flat assertion: "While one of the men held a shotgun to the assistant bank manager, the other came into the tellers' area and took almost $23,000 in cash from the tellers' drawers." (Slip op. at 3796) Only two witnesses to the actual robbery testified at the trial, and they differed specifically and quite emphatically on the matter of weapons. One stated that the robber who was clearly not Defendant had a "shotgun," and the other stated that

the same robber held a "long [illegible]" (Tr. 13; Tr. 44) The first witness testified that the robber alleged to be Defendant had a "rifle" and the second witness insisted that that robber was unarmed. (Tr. 27; Tr. 57) Thus, it is clear that the robber alleged to be the Defendant did not carry a shotgun and may have been unarmed, and it is not clear whether the other robber did or did not carry a shotgun. No pistol was observed during the robbery.

As for the evidence seized at the apartment, its relevance to the robbery, where it is uncertain as to even what general type of weapons were used, becomes even more remote since it is not clear what caused the riddling of the red pants which were so prominently displayed to the jury. While the one F.B.I. agent testified that the holes appeared to be "pellet holes possibly from a shotgun" (Tr. 80), the second agent who identified three lead fragments which he had removed from a wall of the back bedroom of the apartment, between two closets, stated that two of the same fragments appeared to be "either .22 or .25 calibre slugs that have been fired from a .22 calibre pistol." (Tr. 84) The second agent noted that there was a cardboard box against the wall, in between the two closets, and that a shot appeared to have been fired through the box into the wall. (Tr. 85) The first agent, of course, had stated that he had found the red pants in the cardboard box between the two closets. (Tr. 79) All of this testimony, as well as the cartridge, lead fragments, shells, and riddled pants were admitted into evidence.

The Assistant United States Attorney seized upon this irrelevant evidence and made it the focal point of his argument, displaying the exhibits to the jury and exclaiming upon summation:

> ". . . what was found? These shells. The shot through the pants from the box. Can there be really any fact that those are pellet holes, and then again the pellet holes, themselves, that were in the wall?
>
> "What is said of this man? I think you can come to your own conclusion, but I would submit to you that it shows clearly that there were weapons inside the apartment. That the weapon was used for test fire inside that apartment, and that Mr. Medico had access to weapons, and that is corroborative evidence, showing the opportunity was there to commit the crime, and showing that the gun used to commit the crime was inside the apartment." (Tr. 117)

In addition, even the trial Judge showed the effect of the inflammatory evidence, as demonstrated by his statement at sentencing:

> "This is a very serious crime, this is a crime where guns have been used, deliberately, where guns were fired in advance to make sure that they could kill . . ." (September 17 Tr. 7)*

Admission into evidence of the pants, fragments, and shells was far more egregious error than that asserted in United States v. Robinson, 544 F.2d 611 (2d Cir. 1976), presently under reconsideration by the Judges of this Circuit en banc. In Robinson the evidence at issue is testimony about a .38 caliber pistol found on Robinson at the time of his arrest ten weeks after the bank robbery. There was nothing in the bank surveillance photos to show that the man claimed to be Robinson was

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* Reference to pages from transcripts other than the main June 28 Trial Transcript will include the date in 1976 of that hearing, "Tr.", and the page. As here, "September 17 Tr.7." All transcripts have been docketed, and made part of the record on appeal.

using a gun at the time of the robbery, and there was no direct testimony that a .38 was actually used in that robbery, although there was testimony by a co-conspirator about the weapons that had been assembled in preparation for that robbery including a .38 pistol. The trial Court held several hearings on the question before permitting testimony about Robinson's possession of the gun; the Court, however, did not permit the gun itself to be produced.

In the instant case, the testimony was not about a gun which had been seized at the time of Defendant's arrest since no weapon was found on Defendant at that time or at the apartment upon the subsequent search. Instead, the pants, fragments, and shells, indicating some unidentified gun, were admitted into evidence, as opposed to Robinson, where only testimony about the gun, but not the .38 itself, was admitted because of the recognized special emotional impact of tangible evidence of this sort. Any possible justification for admitting such evidence, in order to permit a possible identification of the Defendant as one of the bank robbers by means of the jury piling remote inference on remote inference, was clearly outweighed by the emotional message of reckless and wanton violence these tangible exhibits were calculated to convey to the jury and the trial judge.

The majority seems to recognize this extreme prejudice when it concedes that:

> "The trial court, of course, would have been justified in excluding this evidence in light of its very prejudicial nature. However, as indicated earlier, this was a matter in which the trial judge has wide discretion, and under all the circumstances, particularly

since no proper objection was made, we cannot say that he abused this discretion or committed plain and reversible error." (Slip op. at 3812)

Not only was the admission of the evidence "plain error" requiring no objection at all, but in any event, Defendant's former court-appointed attorney did raise an objection which, while not technically specific, should have been sufficient to protect Defendant's rights:*

"MR. KELLY: Objection, Judge. May I renew my objection made at a prior proceeding?

THE COURT: Overruled." (Tr. 79)

At the "prior proceeding", the suppression hearing four days earlier, Defendant's attorney had advised the Court that questions to the relevance of the evidence seized remained but:

"I think that can be taken up at the trial." (June 24 Tr. 52)

Appellate counsel did not represent Defendant at trial, and was appointed after trial counsel moved to withdraw because of conflict of interest based upon Defendant's dissatisfaction with his representation at trial. Defendant expressed his objections on the record while the jury deliberated, and the trial Court treated them as a motion for a mistrial. We cannot explain why trial counsel did not utter a more explicit objection to this astonishing evidence, but do not see the point in pursuing Defendant's objections as to his representation, when clearly what took place was "plain error" and required no objection.

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* Rule 103(d) of the Federal Rules of Evidence states: "Plain error. - Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

POINT II

THE ADMISSION, PURSUANT TO RULE 804(b)(5), OF DOUBLE HEARSAY TESTIMONY PURPORTING TO IDENTIFY THE "GETAWAY" CAR WAS PREJUDICIAL ERROR.

The "Confrontation Clause" of the Sixth Amendment to the United States Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Rule 804(b)(5) of the Federal Rules of Evidence states in pertinent part:

> "(b) Hearsay exceptions. -- The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> "(5) Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." [emphasis added]

The "getaway" car allegedly used by the bank robbers was identified at the trial by means of double hearsay testimony: that is, William Carmody, a bank employee, was permitted to testify under Rule 804(b)(5), supra, over objection, that he

had spoken about five minutes after the robbery through the glass door of the bank to an "unidentified bank customer" who, in turn, said that he had obtained the alleged license number of that car from an "unidentified youth . . . a young man at the curb." Neither the "unidentified bank customer" nor the "unidentified youth" was produced at trial to testify under oath and become subjected to cross examination. The car bearing the license number was then linked to Defendant by the testimony of the registered owner of the vehicle who had the registration in his possession, William Cariola, a drug addict with a criminal record, who was called as a witness, and who denied on the stand his ownership of the car and testified that he had seen Defendant in a car with that license plate number.* The incredible tale of how the vehicle came to be registered in Cariola's name was kept from the jury by the trial Court.

As the majority opinion herein asserted: "This Court has not yet had occasion to define the proper scope of Rule 804 (b)(5) in a criminal trial." (Slip op. at 3803) Furthermore, in reaching its decision, the majority expressly chose not to follow United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975), where the Court held that the "Confrontation Clause" of the Sixth Amendment to the Constitution would bar the admission of hearsay testimony, even if the requirements of Rules 803(24) or 804(b)(5) are satisfied, when none of the three conditions set forth in Dutton v. Evans, 400 U.S. 74 (1970) are met:

* The majority conceded that it "strain[ed] credulity that a person could remember the exact number of his co-worker's license plate, when he apparently had known his co-worker only casually and had seen him regularly over a short span of time . . ." (Slip op. at 3808)

> "(1) There are 'indicia of reliability' surrounding the evidence; (2) the evidence is 'peripheral' rather than 'crucial' or 'devastating'; and (3) the witness is equally available to the prosecution and the defense." United States v. Yates, 524 F.2d at 1286.

As Judge Mansfield has observed in his dissenting opinion, the double hearsay identification of the getaway car admitted by the trial court lacked any guarantee of trustworthiness entitling it to admission under the residual hearsay exception of Rule 804(b)(5). Citing Kotteakos v. United States, 328 U.S. 750 (1946), his dissent stated:

> "In the absence of any such guarantee or of an opportunity to test the reliability of the proof through cross-examination, the admission of this evidence in my view constituted an abuse of discretion and the error was not 'harmless'." (Slip op. at 3813)

The majority asserts that the admission of the double hearsay testimony of the bank employee, Carmody, was "problematic" not because of the likelihood of its unreliability or untrustworthiness, but only because of the testimony of the linking witness, Cariola, whose dubious credibility was not allowed to be exposed to the jury. We submit that the majority misses the point that even before reaching the testimony of Cariola which tied Defendant to his car (Cariola's car, not Defendant's), the testimony of the bank employee, Carmody, was "problematic" precisely because of the unreliability and untrustworthiness of the source of the information expressed in that testimony.

Mr. Carmody did not see the getaway car. The "bank customer," never identified, who gave a number and description to Carmody through a glass door, did not see the getaway car

either. It was the "young man at the curb," also unidentified and not produced for trial, who had supposedly observed the car five minutes before he called out its license plate number and description to the bank customer who relayed them through the glass door to Carmody.* The fact that Carmody jotted down a description on his checkbook does not bear on the trustworthiness of the two absent links in the hearsay chain. And even Carmody himself, who testified at trial about a "brown Valiant" (a Plymouth) and whose checkbook, admitted into evidence, showed a tan Dodge Valiant (a non-existent model), was subsequently contradicted by Cariola who testified to having seen Defendant drive an "off-white Dodge" to work (Tr. 91-92; Tr. 98).

The conditions under which the "young man at the curb" had seen the alleged getaway car, its color, and its license plate number are unknown, and could not be probed at trial. We know nothing of the young man's visual acuity or of how good a look he got at the car, or from what distance, or in what light he had seen the car. Presumably the getaway car had sped away. For how long did the young man have the car in sight? Had he seen guns? Had they been aimed at him? Was he scared? Was he excited? Had he written down the plate number and description of the car, or did he keep it in his head for the five minutes between when he saw the car and when he called out the description

* The trial transcript does not substantiate the observation by the majority that Carmody could see the young man at the curb's lips move as the customer was telling Carmody what was being said. (Tr. 94).

to the bank customer?"* Was the car he described actually the getaway car? What motive might the young man have had to "plant" a false lead? He himself apparently "gotaway" with the same dispatch as the robbers. The "unidentified customer" took no note of the "unidentified youth's" license plate number as he drove off in his own car; and, in fact the "unidentified customer" made his own "getaway" -- apparently not to return.

Asking such questions is not an exercise in speculation. It is rather a cataloging of questions that might well have been brought out on the questioning (direct and cross) of the unidentified "young man" and "bank customer," had they been produced at trial, questions going to the reliability of their testimony.

Are these "unidentified" witnesses to be presumed as a matter of law to be so worthy of credibility as to satisfy Rule 804(b)(5)? Judge Mansfield thought not. He stated in his dissent:

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* Although the majority was of the opinion that the double hearsay testimony met all the specific requirements for admission as a present sense impression under Rule 803(1), it conceded that "the cases reveal a hesitancy to admit the statement without more when the bystander's identity is unknown," and that "this may well be the reason Judge Weinstein decided to rely on Rule 804(b)(5)." (Slip op. at 3805-6). In addition, as Judge Mansfield points out in his dissent, Rule 803(1) at best could only cover the first stage of the double hearsay, the statement from the young man to the bank customer, because only the young man had "perceived" the startling event he was describing five minutes later. Furthermore, as Judge Mansfield observes, it is difficult to conclude that the license number and description of the vehicle would be a "description" or "explanation" of an "event" within the meaning and common usage of Rule 803(1). (Slip op. at 3816, f.n.3). In addition the statements by the young man and the bank customer were not made to one who had an "equal opportunity to observe and check [any] misstatements * * *" Weinstein's Evidence, vol. 4, ¶803(1)[01], p. 803-74.

"This type of eyewitness identification has long been considered 'peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.' United States v. Wade, 388 U.S. 218, 228 (1967)." (Slip op. at 3814)

It is clear that the Carmody double hearsay testimony failed to meet even the first standard of Rule 804(b)(5) as it lacked any "circumstantial guarantees of trustworthiness."

As the Supreme Court stated in United States v. Wade, 388 U.S. 218, 224 (1967), a criminal defendant's "most basic right" is that of a "fair trial at which the witnesses against him might be meaningfully cross-examined." In the present case, the majority has upheld the utilization of the residual hearsay exception of Rule 804(b)(5) even though serious questions of reliability have been raised and there was no opportunity for cross examination (the witnesses being unidentified and unavailable).* In so doing, the majority chose to disregard the Sixth Amendment impact in 804(b)(5) and thus established an authority for this Circuit which is expressly at odds with that

* In his dissenting Opinion Judge Mansfield distinguishes United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976), cited by the majority as a case which applied the residual hearsay exception of Rule 803(24) -- "availability of declarant immaterial". In that case, Rule 803(24) was applied to support admission of rebuttal testimony by two witnesses as to statements of a previous witness regarding defendant's request for money. "[T]he significant difference is that there all the declarants . . . were all available for cross-examination and the jury was allowed to resolve a conflict in credibility among witnesses who were present and whose demeanor could be judged." [emphasis added] Slip op. at 3818.

set forth in Yates, the only precedent to date dealing with this crucial matter. The Court of Appeals in the District of Columbia in United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975), recognized the serious constitutional problem and refused to apply the residual hearsay exception (Slip op. at 3806-7, fn. 6).

In view of the denial of Defendant's right under the Sixth Amendment to confront witnesses linking him directly with the crime charged; because of the lack of decisional interpretation of Rule 804(b)(5), particularly in this Circuit; and because the decision as it now stands establishes a conflict respecting serious procedural and Constitutional rights between Federal jurisdictions, it is submitted that rehearing en banc is appropriate.

CONCLUSION

For the reasons stated, rehearing en banc is appropriate, and upon rehearing, the judgment of conviction herein should be reversed.

Dated: New York, New York
June 8, 1977

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 8 day of JUNE, 1977, deponent personally served the within PETITION OF DEFENDANT-APPELLANT MICHAEL MEDICO FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

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Robert La Grassa

Sworn to before me this
8th day of June, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930903
Qualified in Queens County
Commission Expires March 30, 1979